No. 15388

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANASTASIO LAWRENCE AMAYA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Southern District of California, Central Division, the Honorable Thurmond Clarke, Presiding.

APPELLANT'S REPLY BRIEF.

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I.

Inquiry as to Probable Cause Was Relevant to the Issue of the Officer's Authority.

Respondent contends that the question of whether Sherrill had probable cause to make an arrest is not in the case because no arrest took place. Quotations from several decisions are set forth in the government's brief in an effort to give substance to this thesis. Yet, examination of those decisions reveal not only that the Courts do in fact consider whether probable cause existed for the attempted performance of duty; but in *Carter v. United States,* 231 U. S. 232, 235, a finding to this effect seems to have been deemed a prerequisite to a conviction under 18 U. S. C. A. Sec. 111.

It is clear why. The mere flashing of a badge in a crowded cafe may color the officer as an agent of government; but this gesture could not confer authority in him which was never his (*Whipp v. United States,* 47 F. 2d 496), nor would it sanctify an abuse of authority which was his (*Screws v. United States,* 325 U. S. 91; *Williams v. United States,* 341 U. S. 97). A police badge is not a substitute for authority—it is merely a symbol of it. And a symbol cannot justify what the law forbids. No matter what his reason for being in the cafe, if Sherrill sought to give his presence and subsequent conduct while there an official character, then it was certainly appropriate to discover under what authority he purported to act, and how he exercised it. If Sherrill had no authority—under the circumstances—to interrogate, to detain, and to attempt the arrest of patrons in the cafe; or, if by these acts, he exceeded his authority, then it is crystal clear that he was not performing his duties lawfully.

The government does not seriously controvert this point, but prefers to clothe Sherrill's conduct with legality by limiting consideration of his activities solely to the moment of the alleged offense. This is more than Sherrill himself chose to do; and overlooks the circumstances which undoubtedly provoked the attack on him.

The short of it is that appellant's guilt could not be measured solely by the legality or illegality of what Sherrill was doing at the time of the alleged offense (*Whipp v. United States,* 47 F. 2d 496 (C. C. A. 6, 1939); *Carter v. United States,* 231 F. 2d 232, 235 (C. C. A. 5, 1956)). The authority under which Sherrill purported to act was indivisible; either he had a right—*i.e.,* probable cause—to conduct an investigation in the cafe, or he did

not. If his entry and interrogation therein was without authority, his effort to confirm a mere suspicion could not restore it (*cf. Johnson v. United States,* 333 U. S. 10).

In any event, the government was required to prove that at the time of the alleged assault, Sherrill was *lawfully* performing an official duty. The issue of probable cause entered into the case whether Sherrill was making an arrest, or merely laying the foundation for one. If his interrogation and detention[1] of the "man in the white shirt" was improper, then, whatever other statute appellant may have offended, it was not 18 U. S. C. A., Sec. 111.

The government defends Sherrill's entry into the cafe, and his subsequent investigation there, as lawful because it was the only "proper and logical thing to do" (Resp. Br. p. 9). We disagree, not because we oppose logic and propriety, but because mere convenience has never been accepted as an excuse for the capricious enforcement of the law (*McDonald v. United States,* 335 U. S. 451, 455.) If it were, few citizens could escape the arbitrary interference with their liberty by police officers.

Respondent complains that appellant offers no other remedy for enforcing the immigration laws. It is not, of course, our duty to do so. But, as was pointed out in appellant's opening brief (pp. 10-16), both Congress and the Attorney General had established adequate law enforcement procedures. It was for Sherrill to operate within their framework; and if, by so doing, the law

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[1]In light of the background leading up to the intercession of the alleged "illegal,"—the elaborate preparations for his commitment and the vowed purpose of Sherrill's entry into the Cafe—it would appear that his interrogation was more than a "detention".

could not be properly enforced, then his recourse was to the Legislature.[2]

However, the Government's claim of helplessness here is not impressive. Sherrill and his superiors knew of their proposed invasion of the La Chaquita Cafe *a week in advance*. There was ample time in which to place the informer's reliability and the facts said to justify an arrest and interrogation of persons in the cafe before an impartial official empowered to issue warrants therefor. Even after the informer left, Sherrill had a telephone with which to call his superiors, and an opportunity to use it. He did not utilize these law enforcement safeguards, not because they were inadequate, nor for lack of time, but because under his construction of the law—

"I may arrest without warrant." [R. 39.]

We submit that such arrogance, though indicative of the manner in which the law was here attempted to be enforced, is inconsistent with the lawful exercise of authority.

II.

The Informer's Identity Was Material to the Issue of Sherrill's Authority, and Hence, the Trial Court's Failure to Order Its Disclosure, or Dismiss, Was Error.

We admire Counsel's artful casting of Sherrill in the role of a kindly, patient investigator, trumpeting his identity for all to hear (Resp. Br. pp. 3, 4, 10, 13). But we fail to find anywhere in the record support for their ad-

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[2]Which is apparently the course pursued by the F.B.I. following the decision in *Coplon v. United States*, 185 F. 2d 629. See appellant's opening brief, page 16.

jectivial description of an alien *furtively* escaping from the cafe while this diligent peace officer was busy discovering who was violating the immigration laws. As we read the record at bar, Sherrill's purported announcement of his authority and purpose was revealed only to those whom he confronted, none of whom appeared to have been near the alleged "illegal." But there is nothing in the evidence indicating that the "man in the white shirt" was or knew of Sherrill's presence in the bar, or his identity, until accosted by him; and that person's attempted departure no more warranted Sherrill's interrogation of him then, than if he had remained seated.

This would seem to dispose of the government's contention that Sherrill had a lawful right to intercept the departing patron, simply because he was leaving, thus rendering the informer's identity immaterial.[3] The fact is that appellant had a right to inquire—at trial—whether Sherrill was pursuing a lawful investigation in the cafe; or simply one of his own concoction (*Roviaro v. United States,* 353 U. S. 53, 61). The issue is one of whether Sherrill had the authority—under all the circumstances—to interrogate, to detain, and to effect an arrest—all without a warrant. These acts are said to be justified here because inspired by information received from an informer. It follows that the latter's identity becomes an important link in the determination of whether Sherrill was lawfully performing his duty (*Roviaro v. United States,* 353 U. S. 53, 61; App. Op. Br. pp. 18-21).

Roviaro cannot be limited, as the government seems to urge, to situations where an informer is a participant in the alleged crime. The Supreme Court has refused to

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[3]See respondent's brief, p. 13.

draw the line there (at p. 62), and even cites with approval decisions rejecting that limitation (at p. 61, footnotes 9 and 10). Indeed, as we have said, the line can only be drawn where fairness and justice will be best served. But it is neither fair nor just for the prosecution to paint an officer with the color of authority, and then hide the paint brush.

Conclusion.

It is respectfully submitted that the judgment of the District Court should be reversed, with directions to enter a judgment of acquittal, or in the alternative, for a new trial.

Respectfully submitted,

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Attorney for Appellant.